

ORIGINAL

RECEIVED

NOV 11 0 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act)
Competitive Bidding)

PP Docket No. 93-253

To: The Commission

COMMENTS

The Law Offices of Richard S. Myers hereby submits comments in the captioned proceeding. These comments will address matters concerning auction design and particular issues about auctions for licensing Personal Communications Services ("PCS").

Bidding Method. The Commission has stated a tentative preference for oral bidding as the basic auction method, finding it assigns a license to a party "who values it the most," makes aggregation of licenses easy, has lower private costs than sealed bidding, and is fair because it occurs in the open. NPRM, para. 37. It found that oral auctions, however, are more subject to manipulation than sealed bidding. Id., para. 38. The Commission found that sealed bidding would be simple to administer and less subject to manipulation by bidders than oral auctions. Id., para. 40. It found that sealed bidding, however, may not award the item to the "party who values it the most."

It is respectfully submitted that sealed bidding should be the Commission's basic auction method, not oral bidding. Oral bidding will not have lower private costs than sealed bidding because, under either method, qualified bidders will perform market analyses to determine the right amount to bid prior to the auction. The

No. of Copies rec'd
List ABCDE

OA 40

Commission should also take into account the "irrational" or "strategic" bidder who exceeds every competing bid in an oral auction simply to obtain the license at any cost. An oral auction leading to such a result might be "fair," but will create societal costs associated with the "irrational" bidder who overbids, tries to pass the overbid onto consumers, then goes bankrupt paying the overbid, while a competitor who bid rationally for the license, i.e., in accordance with sound economic analysis, would have better served the public. For the foregoing reasons, awarding the license to the party "who values it the most" should not be the determinative criteria for choosing the basic auction method. A party may value a license more than another party for reasons that are socially and economically counterproductive. A strategic bidder may vastly overbid just to keep out competition, then find that the business cannot be profitable due to the overbid. In short, the criteria of awarding a license go to the party "who values it the most" means that it may go to a party who overvalues it the most. A better criteria is that a license should go to the party who rationally values it the most. If the Commission follows that criteria, it should find that sealed bidding is the best means for ensuring that rational bidding will occur and overbidding will be minimized.

Smaller competitors will have no chance whatsoever in an oral auction with the strategic overbidder. Sealed bidding at least creates for the smaller entity the chance that the strategic overbidder will miscalculate its "overbid," so that it actually

"underbids" compared to the smaller entity's rational bid. The smaller entity has no such chance in an oral auction.

Moreover, sealed bidding will be easier to implement than oral auctions. The Commission can release dates for filing applications and submitting bids for particular markets, without the troublesome delay that will be caused by oral auctions taking longer than anticipated. The Commission can process sealed bids in its own due course. A clear record of the bidding will be maintained through the sealed bid process so there can be no possibility of disputes over which party submitted which bid, the amounts of the bids, or whether the oral bidding was kept open long enough. Sealed bidding will be less subject to manipulation and therefore lower the Commission's costs of enforcing anti-collusion rules. Further, since sealed bids for individual licenses can be accepted at the same time "combinational" bids are accepted, there will be less cost and delay incurred in determining whether a "combinational" bid was the winning bid. For the foregoing reasons, the Commission should adopt sealed bidding as the basic auction method.

Limitations Placed by Bidders on Winnings or Expenditures.

The Commission proposed permitting bidder-specified expenditure limits if the Commission uses simultaneous sealed bid auctions. NPRM, para. 65. Such a proposal makes sense in the context of a bidder who is not a designated entity and will be expected to pay the entire amount of the winning bid soon after the auction is held. Id., para. 68. However, a different approach to pre-auction bidder-specified limits should be followed for designated entities

who will be allowed to use alternative methods for paying winning bids. In those services where applicants must demonstrate their financial qualifications, designated entities should be allowed to secure as licenses for as many systems as their demonstrated financial qualifications will allow them to construct and operate under the minimum construction and operating rules.

Because a designated entity will not be required to pay a winning bid in a lump sum, it should be allowed to: (1) rely upon the same financial resources to cover the costs specified in multiple long-form applications for different licenses; and (2) bid for those licenses.¹ For example, in a sealed-bid auction, if an applicant has net liquid assets of \$10 million, it should be permitted to submit applications, and participate in the bidding, for any number of markets for which it can make the up-front payment. The applicant would be limited to winning a number of markets the construction and initial operating costs of which, in total, are within the applicant's demonstrated financial resources. In this example, if the applicant's itemized costs in three separate applications each total \$5 million, for a total of \$15 million, the applicant should be allowed to participate in the bidding for all three markets until it wins two of the licenses. The applicant's \$10 million in net liquid assets would cover the costs of the two systems. It might later be determined that an

¹ There is precedent for allowing cellular applicants, for instance, to apply a financial commitment which is not market-specific to multiple applications. See 47 C.F.R. §22.917(c)(i), (iii) (1992).

applicant has submitted winning bids for multiple licenses, where the total costs of the systems exceed the applicant's financial resources demonstrated in its applications. In that event, the applicant would be allowed to withdraw one or more of the winning bids, and the license would be awarded to the next-highest bidder.

Alternative Payment Methods. The Commission has proposed installment payments and royalties as alternative methods for designated entities to pay off their winning bids. NPRM, para. 68-70. The easiest method would be installment payments specified over a certain term. In the cellular radio field, for example, equipment vendor financing typically provides for a specified term of years, with payment of interest only during the first years and repayment of principal in the following years.² To simplify the installment payment method, the Commission could require the designated entity to pay 11% of its winning bid per year for 10 years, meaning that the entity would have paid a total of 10% in interest on the winning bid at the end of that period. If the entity paid off the winning bid earlier, it would not have to pay the entire 10% interest amount. For example, if the entity made annual payments of 11% of the winning bid for the first 3 years (equal to 33% of the winning bid amount), and decided to pay off the rest of the bid at that time, it would pay an additional amount

² For instance, the loan term for cellular financing could be 8 years with an interest rate of a certain percentage above the prime rate, with the payment of interest only during the first 3 years, and repayment for the remaining years as follows: Years 4 and 5, 15% principal repayment per year; Year 6, 20% principal repayment; and Years 7 and 8, 25% principal repayment per year.

of only 70%, so that the installment payments over the 3 years total 103% of the winning bid. The payments could be made once a year. This method is simple because it does not require complex accounting or interest calculations. It could be implemented with little administrative cost.

Treatment of Designated Entities. The Commission proposed special treatment for designated entities, such as installment payments and tax certificates. NPRM, para. 72-81. In doing so, the Commission contemplated that designated entities might form consortia which were eligible under the special proposals. With respect to possible consortia, the final rules should make clear how the consortium's membership will affect such eligibility. The following principals should be followed. First, whatever the definition of "small business" the Commission settles upon, the rules should provide that a consortium of "small businesses" does not maintain that special status if the net worth of its members together exceeds the defined limit. However, a consortium of "small businesses" whose members together meet another eligibility test (e.g., for minority or female ownership and/or control) would maintain the special status. Moreover, up until a stated time, such as no later than 5 business days prior to an auction, the Commission should allow only the designated entities that filed applications to form consortia. By doing so, a consortium's members would have an opportunity to pool their resources and bid for more licenses and a greater amount of spectrum, realizing they might lose their special status due to their participation in the

consortium. Permitting consortia formation prior to the auctions will increase the ability of special groups to compete for licenses. Consortia will create larger bidders and higher license bids from smaller entities which are willing to lose their special status in order to increase their bidding opportunities.³

Prohibition of Collusion. The Commission's NPRM sought a balance between prohibiting collusion while permitting the formation of bidding consortia. NPRM, para. 93. A simple rule would be to disallow any discussion, collaboration or sharing of information or strategies among potential bidders, including those who are potential consortia members, that involve: (1) the value of any license subject to auctions; (2) the amount that should be bid for any such license; or (3) bidding strategy. This prohibition would not apply once a consortium has been formed, the Commission has been notified of that formation, and the consortium has specified which applications it intends to continue to prosecute in the auction process. The prohibition should be self-enforcing in the sense that losing bidders who believe collusion occurred can be expected to bring the matter to the Commission's attention. The Commission can also release Public Notices at regular intervals to remind participants in the auctioning process that violations of the anti-collusion prohibition will not be tolerated. The penalties for willful violation should range from the applicant's

³ For instance, there is no special proposal for designated entities when it comes to the largest blocks of PCS spectrum, i.e., the blocks for Major Trading Areas. Allowing designated entities to form consortia prior to the auction could create additional, larger bidders for such spectrum blocks.

disqualification from the auction process for a particular license with forfeiture of entry and deposit payments, to the applicant's disqualification from the entire auction process for the service involved. If licenses have already been issued, the Commission could commence revocation proceedings based upon the violation, or issue forfeitures, following existing procedures. This range of penalties will give the Commission latitude in penalizing an offender based upon the severity of the violation.

Application, Bidding and Licensing Requirements. The Commission's NPRM proposed that no major modification amendments should be permitted to applications prior to the auction. NPRM, para. 101. In keeping with the Commission's desire to enhance the formation of consortia, as noted above, the rules should permit designated entities only to form consortia following the Public Notice listing the qualified bidders. Applicants who are designated entities should be allowed to notify the Commission no later than 5 business days prior to the auction that they have formed a consortium, which applications of its members the consortium will prosecute in the auction process, and would include appropriate amendments to those applications. Applications that will not be prosecuted would be voluntarily withdrawn. The notification would also establish whether the consortium maintains its special status as a designated entity. If the consortium is not eligible to be a designated entity, the Commission should accept appropriate amendments to the consortium's applications. Such amendments, for example, could change a frequency block to one

that is not set aside for designated entities. As previously discussed, permitting formation of consortia among designated entities will create larger bidders who can be expected to make additional, higher bids for more valuable licenses. By allowing designated entities to shed their special status through consortia, it provides them with a chance to compete against larger players for more valuable spectrum.

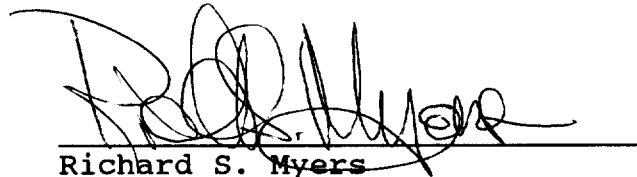
Combinational Bidding for PCS Licenses. The Commission's NPRM sought comment on whether to allow combinational bidding for PCS licenses. Combinational bidding should not be permitted on the two blocks set aside for designated entities. To allow combinational bidding on those blocks would largely defeat the purpose of the set asides, i.e., to enhance the opportunity for small businesses and minority or female owned or controlled businesses to participate in the auction process. That opportunity would be reduced if such businesses had to compete with combinational bidders within their own ranks. Diversity in ownership would also tend to suffer. Accordingly, the Commission should not permit combinational bidding on the set-aside frequency blocks for PCS licenses.

Sequence of bidding for PCS licenses. The Commission proposed to auction the biggest markets first in the bidding for PCS licenses, noting the need of winners for licenses for large cities to form clusters with smaller markets. NPRM, para. 125. The Commission should follow this approach by auctioning the largest Major Trading Area ("MTA") first, then all of the Basic Trading Areas ("BTAs") within that MTA across all frequency blocks. Then

the Commission should proceed to the next largest MTA and all component BTA licenses across all frequency blocks. This approach would be the most fair for all PCS licensees within a given MTA because no single licensee in that area would have a head start over the others. The only entities that might experience delay would be combinational bidders for MTA licenses attempting to obtain a regional or nationwide authorizations. Such combinational bidders are likely to be the largest bidders with vast financial resources, a great advantage over smaller businesses. Such regional or nationwide authorizations obtained through combinational bidding will also be the most valuable. In any sequencing for PCS auctions, some participant will experience delay. Combinational bidders for MTAs seeking regional or nationwide authorizations will be the most able to bear the costs of such delay. The sequence for PCS auctions, therefore, should start with the largest MTA licenses, followed by all of the component BTA licenses of that MTA across all frequency blocks.

Respectfully submitted,

LAW OFFICES OF RICHARD S. MYERS



Richard S. Myers

November 10, 1993

Law Offices of Richard S. Myers
1030 15th Street, N.W., Suite 908
Washington, D.C. 20005
(202) 371-0789